UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KOOKMIN BANK CO., LTD.,

Plaintiff,

v. 22 CV 05602 (GHW)

BEN ASHKENAZY,

Defendant.

DAOL REXMARK UNION STATION, LLC,
KOOKMIN BANK CO., LTD.,

Plaintiffs,

v. 22 CV 06649 (GHW)

UNION STATION SOLE MEMBER, LLC,

Defendant.

New York, N.Y.
September 13, 2022
3:04 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES VIA TELECONFERENCE

MORRISON COHEN, LLP
Attorneys for Plaintiff
BY: Y. DAVID SCHARF
AMBER R. WILL

KASOWITZ BENSON TORRES LLP
Attorneys for Defendant
BY: ANDREW W. BRELAND
DANIEL J. KOEVARY
DAVID J. MARK
DAVID E. ROSS

(The Court and all parties appearing via teleconference)

(Case called)

THE COURT: Let me start by taking appearances of the parties. There are two cases for which we are holding simultaneous initial pretrial conferences today, the first is 22CV5802, the second is 22CV6649. I'm going to ask for the plaintiff and defendant's counsel to announce their appearances separately in each of the two matters.

In each case I'm going to ask the principal spokesperson for each side to identify him or herself and the members of her team, rather than having each lawyer introduce themselves individually.

Let me start with 5082. Who's on the line for plaintiff?

MS. WILL: For plaintiff, it's Amber Will and Y. David Scharf from Morrison and Cohen.

THE COURT: Thank you.

And who's on the line for defendant?

MR. ROSS: For defendants, your Honor, David Ross from Kasowitz Benson Torres, and with me are David Mark, Daniel Koevary and Andrew Breland.

THE COURT: Thank you.

Turning to 6649, who's on the line for plaintiffs?

MS. WILL: For plaintiffs, it's Amber Will and

Y. David Scharf from Morrison Cohen.

THE COURT: Thank you.

Who's on the line for defendants?

MR. ROSS: For defendants, David Ross, David Mark, Daniel Koevary and Andrew Breland.

THE COURT: Very good. So let me begin with a few brief instructions I'd like the parties to follow here. First, please remember that this is a public proceeding. Any member of the public or press is welcome to dial in to this conference. I'm not presently auditing whether third parties are listening in, but it's possible; so I just ask that you keep that fact in mind.

Second. Please state your name each time that you speak. You should do that regardless of whether or not you've spoken previously.

Third. Please keep your lines on mute at all times except when you're speaking to me or your adversary.

Fourth. Please abide by instructions from our court reporter that are designed to help her do her job.

And finally, I'm ordering that there not be any recording or rebroadcast of all or any portion of today's conference.

So, counsel, with that out of the way, let me turn to my agenda for each of the two proceedings. First, I'm going to give the parties the opportunity to describe any legal or

factual issues that you'd like to draw to my attention in connection with respect to each of the two cases.

Second. I hope to discuss the process that we'll be using to litigate the case going forward. To that end, I expect to look to the parties' proposed case management plan and scheduling orders as a framework for our conversation. I understand that there may be an application to stay discovery pending resolution for the anticipated motion to dismiss. In what I'll describe as the Ashkenazy matter, I will hear argument with respect to that issue.

And finally, I hope to discuss what, if anything, I can do to help facilitate an amicable resolution to the case.

So with that out of the way, let me begin with counsel for plaintiffs in each of the two cases. I welcome any comments about the nature of each of the two cases that you'd like to share. Counsel, please proceed.

MS. WILL: Thank you, your Honor. The only issue that we would like -- this is Amber Will, apologies, Morrison Cohen for plaintiffs.

The only issue that we would like to bring to the Court's attention is in the declaratory judgment case, which is indexed at 6649, we believe that there is minimal, if any, discovery that is required in that case to rule on the contractual issues and the unambiguous provisions that were the subject of the preliminary injunction hearing before this Court

a few weeks ago.

With that, we expect that USSM, the defendant in this case, is going to respond to the complaint later this week; September 17th is the current deadline. And because lender does not anticipate needing discovery to prove its contractual claims, it intends to file for summary judgment, or depending on defendant's response to the complaint, at least partial summary judgment on the declaratory judgment claims.

And I believe that is all that we wanted to bring attention to the Court.

THE COURT: Good. Thank you. I'll come back to the nature and extent of discovery in the second part of the call, but thank you for that.

Let me turn to counsel for defendants. Is there anything that you'd like to tell me about each of the two matters?

MR. ROSS: Yes, your Honor. David Ross. First, with the respect to the Ben Ashkenazy matter, as your Honor previewed and we discussed last week on Thursday when we had a pre-motion conference, we do intend to move to dismiss the complaint in its entirety on the bases that we set forth for your Honor last week and in writing.

And we believe that the grounds that we've set forth are not only compelling, but they would dispose completely of the case, if we are correct with respect to the various

arguments that we laid out. And because your Honor's decision in that regard could either eliminate the case in its entirety or substantially cut down on the scope of what is at issue in the case, we do think that there should be a stay of discovery.

And would your Honor like me to go into that now, or is that part two, in your view?

THE COURT: Thank you. That's part two, but I'm happy to segue to it. Please, go ahead.

MR. ROSS: All right. So, your Honor, the reason why we think that discovery should be stayed is because, first of all, there are typically three parts to the standard for establishing good cause for a stay. The first is in one measure or another, either the strength of the motion or the weakness of the pleadings and however you look at it, we think that we have very significant grounds, alternative grounds that I went through last Thursday. So I think we meet the requirement, the first prong of the requirement at least, as having a very significant likelihood of partial or total success.

The second relates to the burden of discovery, and in this particular case, I guess we don't have the discovery in front of us yet, but the point that I made before, which is that the scope of discovery with respect to the issues regarding alleged wrongful acts by my client, communications with third parties, I don't know whether plaintiff would or

would not seek third-party discovery, but depending upon their case and our responsive pleadings, it's possible that there could be third-party discovery.

There is, obviously, the potential for expert damages, according to the plaintiff. They want $560 million from Mr. Ashkenazy under various theories, and they also say they're going to call an expert -- one or more experts with respect to damages.

Obviously, we'd be taking discovery with respect to these claimed bad acts with respect to the causation damages and other issues related to the case. And if your Honor finds that there are ambiguities, we don't expect that, but if you were to find that, then that could give rise to discovery of fact witnesses with respect to the drafting of the guarantee provisions in the case. So we think there is a potential for substantial discovery, which I think is the second part of the test.

The third is whether there's prejudice to the opposing party and, of course, every plaintiff wants to get to their results quickly, but again, this is a potentially huge claim and the briefing right now would end on October 20th under the outside date for the briefing. So no pressure on your Honor as to how quickly you would take to decide the motion, but from my experience, your Honor is very efficient, and it likely wouldn't be a lengthy period of time.

So I think that we meet the requirements that are typically recognized by this Court for the granting of a relatively short stay of disclosure.

I would then go over to the other matter, your Honor, if you'd like me to do so.

THE COURT: Thank you. Just go ahead.

MR. ROSS: All right. With respect to the other case, captioned No. 6649, I understand Ms. Will -- that they're planning to move for partial or total summary judgment right off the bat.

Just a housekeeping matter, your Honor. Ms. Will noted that our answer -- your Honor put our answer date on for this coming Saturday, the 17th, and I don't think it was intentional on your part, unless you tell us otherwise, but it fell on a Saturday, and we would just ask that your Honor extend that date until Monday. Because it was a court order, we can't just assume that one goes to the next calendar date when there's an order in place. So that's just --

THE COURT: That's fine, that's fine. So ordered.

MR. ROSS: Thank you, your Honor.

With respect to the substance, we intend to assert affirmative defenses, equitable defenses and potentially counterclaims. We think that we're entitled to discovery with respect to the actual substance of the complaint, with respect to the foreclosure, and how it was accomplished with respect to

DAOL's standing and other issues that are alleged in the complaint, as well as, as I said, equitable defenses that we would assert in this equitable declaratory judgment case.

So I can't say for sure until I saw the partial summary judgment motion that might be made, but I'm confident that we will take the position -- I'm confident that it's likely that we would take the position that it would be premature, until we've had our chance to accomplish discovery, for that motion to be made.

The parties agreed on a relatively short and efficient schedule in this case, as opposed to the Ashkenazy case where we had completing schedules. But in the Union Station Sole Member case, as a defendant, we have a fairly quick and efficient schedule that was agreed to.

I think plaintiff implicitly recognized that discovery would take place. I guess they want to move for summary judgment at the same time as we're conducting discovery, and as I said, we think that that's ill advised in this particular case since it can all be done in a matter of four or five months.

THE COURT: Thank you. Let me ask a short question. Counsel for plaintiff thought that discovery with respect to the declaratory judgment action would be relatively concise. What I'm curious about, and I welcome any comment, is the extent to which a broader scope of discovery with respect to

the declaratory judgment action, whether in support of equitable defenses or otherwise, would result in discovery that would potentially sweep within its breadth the kind of discovery that plaintiff wishes to take in the Ashkenazy matter.

So basic question is, given the parties' views of the potential breadth of the discovery in the Sole Member case, how does that affect the arguments with respect to the application for a stay?

To put it more simply, if the information is going to be sought from Ashkenazy in the Sole Member case, what's the value of the stay? I'll start with defense counsel. Counsel?

MR. ROSS: Your Honor, if I read the submission from the plaintiff and what Ms. Will said earlier on this call, I understood them to say that they don't need any discovery in the case, in the declaratory judgment case.

So as I understand it, their position is they're ready to rock and roll. It's our discovery which would require time in connection with their potential summary judgment motion. I didn't understand them to be saying they need any discovery.

THE COURT: Thank you. Good.

Let me turn back to counsel for plaintiff. Counsel, I welcome any arguments in response to the application for a stay of discovery in the Ashkenazy matter. Tell me what, if any, discovery you think is appropriate with respect to that case

before you begin a discussion of the relevant factors, which I think counsel for defendants accurately described it. Counsel?

MS. WILL: Thank you, your Honor. The discovery in the Ashkenazy case we believe would be fairly limited, especially since the interference allegations take place in 2022, primarily within the last six months or so. So we are talking about a very limited time period in which discovery would reveal documents and communications that would support plaintiffs' claims in this case.

The interference and the obstructionist actions we would be looking at in discovery, would be communications that plaintiff had -- or defendant had with JLL, the property management company, directions that defendant had made to other third parties, including Amtrak, including the landlord of Union Station, including other parties that we may not know of, that really highlight their position that they interfered with lender's exercise of rights.

That includes lender's ability to foreclose on the mezzanine loan, as well as the other exercise of rights under the pledge and security agreement. Now, while that involves some limited third-party communications, again, it's a very limited time period here with approximately six to eight months or so of documents and communications that would be the focus of discovery. Because it is such a limited scope, we don't think that the burden would be all that great.

In plaintiff's complaint, specifically, there are allegations that were upon information and belief because they were communications that we had learned about from third parties, but we know defendant had directly with those third parties; so we do have not have access to that information without discovery.

THE COURT: Thank you. I raise the specter of this issue during our last conference. The question about they may implicate advice of counsel or other defense, what's your expectation, counsel for plaintiff? Will discovery in connection with the Ashkenazy matter potentially raise such issues?

MS. WILL: Your Honor, if Ashkenazy raises the advice of counsel as a defense and the recourse action, then our position is that the attorney-client privilege would be waived, and we would be able to access attorney communications with defendant in discovery. But we do not know whether defendant is raising that defense at this time.

THE COURT: Thank you. Good. Thank you very much.

So what's your view regarding the defendant's application for a stay?

MS. WILL: Thank you, your Honor. We disagree that a stay is necessary in this case. In Federal Court, typically discovery continues pending dispositive motions, especially for dispositive motions on a failure to state a claim.

As we addressed in the conference last week, lender has challenges to each of defendants' arguments as to why the claims should be dismissed, and we think those challenges are meritorious. That the complaint plausibly alleges that Mr. Ashkenazy, or the borrower, in either of the loan documents triggered springing recourse events or loss recourse events.

This would make Mr. Ashkenazy personally responsible, under the guarantees of each of the loans, and we believe that the complaint adequately alleges that willful misconduct, that interference, and that obstruction by Mr. Ashkenazy to be able to survive any motion to dismiss that will be filed, I believe, next week, by September 22nd.

In regards to, again, the breadth of discovery sought, defendant had said that the scope would be focused on third-party discovery, it could involve all of the wrongful acts, there are expert damages and things like that. But again, as I just mentioned, the scope of discovery is very limited in time period and that should ease any burden on defendants. And because there is a greater chance that the motion to dismiss will not dismiss all of the claims at issue here, discovery should push forward and continue.

In response to prejudice, although there is a briefing schedule on the motion to dismiss, there is no reason to delay discovery when we would only be pushing it back, you know, four or five months, depending on when the Court can rule on the

motion to dismiss.

Because lender believes that it has meritorious claims and expects to vigorously challenge the pending motion to dismiss, we do not believe that defendant has met its burden to show good cause to stay discovery in this case.

THE COURT: Good. Thank you very much. So when considering the arguments with respect to the application to stay, counsel for plaintiffs, I'll give you a moment to respond to any other comments made by defendants as far as the scope of discovery before I turn back to defense counsel for any reply to your arguments. Counsel, anything else from plaintiffs?

MS. WILL: The only other thing I wanted to add, your Honor, is that in regards to the two pending cases and possible overlap of discovery, lender does not anticipate that the discovery in the recourse action would overlap with any discovery in the declaratory judgment case.

In particular, as defendant had kind of assumed, lender believes that the contracts and the contractual language is very clear in the declaratory judgment action and that lender does not need discovery to prove its claims. And that is why we would be seeking partial summary judgment or summary judgment depending on what the responsive pleading is on the claims in the declaratory judgment action.

THE COURT: Thank you. Before I turn to counsel for defendant, just counsel for plaintiff, with respect to the

third consideration highlighted by counsel for defendant, namely prejudice to any party opposing the stay, apart from the fact of potential delay, are there any other concerns that you point me to to show that plaintiffs would be prejudiced in the event of the stay.

MS. WILL: No, your Honor.

THE COURT: Thank you.

Counsel for defendants, any response to the arguments presented by counsel?

MR. ROSS: Just briefly, your Honor. David Ross.

With respect to the second factor involving the extent of discovery, I don't think that the fact that there is an eight months -- six or eight-month period necessarily means that the discovery won't be extensive or burdensome.

So the fact that it doesn't cover a ten-year period sometimes matters, but the fact that it may cover intensely a shorter period doesn't necessarily mean that it won't be substantial.

Other than that, your Honor, I think I have addressed all of the points, and I have nothing further.

THE COURT: Thank you. Bear with me for just a moment while I consider your arguments.

(Pause)

Good. Thank you very much. Counsel, thank you for your indulgence as I was considering the arguments presented by

the parties.

So counsel for defendants accurately summarized the governing law with respect to the question of whether or not the Court should impose a stay under these circumstances.

Counsel for plaintiffs aptly elaborated on the standard as well. Let me just briefly outline it. As counsel for plaintiff noted, a motion to dismiss does not automatically stay discovery in Federal Court except in cases, for example, covered by the Private Securities Litigation Reform Act, which this is not.

As a result, discovery is not routinely stayed simply on a basis that a motion to dismiss has been filed in this court. However, upon a showing of good cause, a District Court has considerable discretion to stay discovery pursuant to Federal Rule of Civil Procedure 26(c). In determining whether good cause exists, courts consider a number of factors. Among them. "One. Whether a defendant has made a strong showing that the plaintiff's claim is unmeritorious; two, the breadth of discovery and the burden of responding to it; and, three, the risk of unfair prejudice to the party opposing the stay." That's a quotation from *Trustees of New York City District Council of Carpenters Pension Fund v. Showtime on Piers, LLC*, a 2019 decision by my colleague, Judge Caproni, at 2019 in Westlaw 6912282 at star one (SDNY, December 19, 2019).

So having considered all of those factors, I believe

that there is good cause to enter a stay pending a briefing and resolution of the anticipated motion to dismiss. Let me just say a few brief words about the reasons why.

First, I'm not going to take a position now regarding the strength of the motion as a whole. Defendants have made a number or arguments regarding the viability of plaintiff's claims. They vary in nature. I'll simply say that with respect to the motion, were it to be fully successful, it could result in dismissal of the action as a whole. Were it partially successful, it might result in limitation in the scope of discovery that's to be conducted here. So I think that the first factor weighs moderately in favor of granting the stay for those reasons.

Here, I appreciate plaintiff's arguments that the duration of time at issue here is relatively brief. It does, however, involve third-party discovery and, I expect, may raise substantial discovery issues as parties explore the mental state of Mr. Ashkenazy as he was taking the steps that plaintiff alleges to have been made in bad faith.

So I think that the burden of responding to this discovery, not only on the parties but also on the third-party respondents, is significant, and I take into consideration the burden on those third parties. And, in particular, given the circumstances on the ground, as I understand them to be, at Union Station; namely, otherwise fraught. And as a result, I

think that the incremental burden may be even more problematic.

With respect to the risk of unfair prejudice to the party opposing the stay, I don't think that there's substantial prejudice to plaintiffs as a result of a stay. Let me say that my assumption is that defendants and their counsel have put in place appropriate litigation holds with respect to any information that is potentially discoverable in this case. I'll give you the opportunity to correct that assumption, counsel, if I'm wrong, but I think that a relatively, hopefully, short delay in discovery in this case will not result in substantial prejudice.

I'm not aware of any actor, and the plaintiffs do not contest that there is any, apart from the temporal delay, for example, no concerns regarding Mr. Ashkenazy's ability to make good on a potential guarantee obligation, should it be triggered. And so, as a result, I don't think that the risk of unfair prejudice weighs so heavily as to weigh against a finding of good cause for the imposition of a stay here, given the weight in favor of the stay that I accord to factors with one and two.

So I'm granting the defendant's application here, and I will try to get to this promptly after it is resolved.

I should say one other thing, and I apologize about this. I should have mentioned it as we were talking about the factor two, but this is a consideration. Counsel noted the

possibility that the Court might find that the contract at issue is at least in part ambiguous.

I understand that argument to be an allusion back to the use of the term "custodian" in the contract as we discussed it back on Thursday. In the event that I were to conclude that the contract is ambiguous, discovery may require exploration of the parties' understanding that the meaning of the contract at the time of its formation, and as a result, discovery would be substantially broader potentially than is anticipated on the assumption that I find the contract to be unambiguous.

That fact also weighed in my assessment of the relevant factors. I apologize for not mentioning it as I went through them earlier, but in sum, having considered all of the relevant factors, I find that there is good cause to stay discovery pending briefing and decision on the anticipated motion to dismiss in the Ashkenazy matter.

Good. So I'll enter an order to that effect.

Let's talk now about the second case. I'm not going to spend -- which I'm going to refer to as the declaratory judgment action. I appreciate that the parties have talked about the scope of discovery in the case. I've reviewed your proposed case management plan and scheduling order. My expectation is going to be that when I set a series of deadlines in this case management plan and scheduling order, that the parties will meet them.

So let me just inquire. Is there anything that you'd like to share with me that might inform my judgment of whether or not these deadlines are reasonable? I've looked at them. I think that, working very hard, you should be able to meet them, but I just want you to understand that when I do set these deadlines, I will expect you to meet them. So I want to make sure that you've fully contemplated all of the work that you'll need to do before I set deadlines.

So counsel for plaintiff, with that in mind, what are your expectations for the conduct of discovery here, understanding the desire to file an early summary judgment motion? And again, my principal reason for even asking is to make sure that the amount of time that the parties have afforded themselves is sufficient. Counsel for plaintiffs?

MS. WILL: Thank you, your Honor. Again, lender does not believe that we need discovery to support our claims. We'll reserve any argument as to whether discovery is needed on the defenses or any of the other affirmative allegations that defendant makes in its responsive pleadings.

But on the declaratory judgment claims themselves, we believe that the schedule as set is satisfactory and can be met, based on plaintiff's understanding of the case and the facts at issue.

THE COURT: Good. Thank you.

Counsel for defendants, let me hear from you. What

are your expectations for the context of discovery here, and is there anything that I should know now before establishing these deadlines for completion of discovery in the case?

MR. ROSS: David Ross, your Honor. We accepted the dates that plaintiff proposed here. Though, we do believe that they are aggressive, and it would not shock us if we had to come back to your Honor for some extension merely to complete them.

Even with everybody working hard and diligently and in good faith, as we expect everyone to do, one thing we didn't build in, your Honor, is what impact there would be if we also need to fully brief a summary judgment motion, a rule 56.1 statement. And we know your Honor is very, very careful about those documents, and so we know it's a lot of work.

So it's possible, if they do proceed with a full-blown summary judgment motion, that could impact the schedule, notwithstanding everybody working hard. So that's what I'd like your Honor to know.

THE COURT: Thank you. So I'm happy to talk now about a modification to the proposed schedule. My goal now, more than anything else, is to set a schedule that the parties think they can meet without the need for an extension, taking into account the kind of contingencies that you've described.

Do you have a proposal regarding potential modifications to the schedule with those concerns and any

others that you may wish to take into account in mind?

MR. ROSS: Your Honor, David Ross. Should we assume that they are making their summary judgment motion and that will proceed in parallel?

THE COURT: Based on what I've heard from counsel for plaintiff, yes, that sounds like a sound assumption.

MR. ROSS: Then, your Honor, what I'd suggest -- this is completely off the cuff because I haven't tried to go directly point by point, but I would say, extending the cutoffs by two to three months would make it far more likely that we would hit the targets.

THE COURT: Counsel for plaintiffs, what do you think? I'm going to construe that as a request for extension of the deadline for completion of fact discovery, as well as completion for expert discovery, by about two months. That would result in modifications to paragraphs 7A, 7E, and 7F, as well as paragraph 10, as the parties have proposed it.

I'm going to talk in a moment about the expert discovery deadline, but it would not change the deadline for the initial round for request for production and interrogatories, and 26A disclosure. What's your view?

MS. WILL: Thank you, your Honor. Plaintiff, when proposing the dates that are in the case management plan, anticipated making a summary judgment motion based on the pleadings and the clear contractual language.

So we think that the dates as proposed are meetable, even with the counterclaims and defenses that might be brought by defendants.

THE COURT: Thank you.

I think that defendant's request for an extension of the deadlines is sound. First, the deadlines that the parties proposed is a month shorter than what I would describe as the default amount of time provided for in my individual rules, which is itself relatively quick.

This is a case of certainly more value, if not necessarily more complexity, than others; so I think a time period at least as long as the default is appropriate. Given that the scope of discovery here may be relatively broad, and given that my expectation is that the parties will meet these deadlines once established, I think it is prudent to add an amount of time of the schedule along the lines proposed by counsel for defendants so that you can meet them.

So let me turn to the question of expert discovery. Counsel, the parties have not provided deadlines for expert discovery here. My inclination is to add deadlines for expert discovery even if you don't think that there will be any. I would have expert discovery be due on the same day as the close of fact discovery, and I would have party proponent and party opponent disclosure due four and six weeks respectively prior to that date. I think that would be beneficial because there

would be a clear date by which decisions about whether or not experts will be used must be made.

So let me hear from each of you about your expectations for the use of experts, and whether the proposed addition of a deadline for experts discovery, consistent with what I just described, would be appropriate.

Counsel, first, for plaintiff?

MS. WILL: Thank you, your Honor. Lender has no expectation to need discovery for experts, any kind of reports for its case in chief. Again, not knowing what defendants are going to raise in their responsive pleadings, we do not know if an expert would be necessary to respond to those allegations or counterclaims.

THE COURT: Good. Thank you.

Let me just make one brief comment based on just a stray element in that sentence, which is not expecting any reports. I just remind the parties that whether or not somebody is an expert will be driven by the nature of their testimony, that is, by whether or not the testimony follows in the scope of rule 702.

As a result, regardless of whether or not the expert is one that is required to provide a report or instead is one that is not required to provide a report, I would still categorize that testimony as expert testimony, and I still say that disclosures would be required with respect to them.

So I just wanted to latch onto that one set of words to remind the parties that expert testimony can come in the form of things that do not require reports, particularly if it's expert testimony of somebody that has not been specially retained.

So, counsel, with that clarification, counsel for plaintiffs, any other thoughts about the need for expert testimony in the case?

MS. WILL: Thank you, your Honor. Our answer is the same whether it is an expert that is required to enter a report or an expert categorized by other means. Lender does not expect that we would need an expert to support its case in chief.

THE COURT: Good. Thank you.

Counsel for defendants, let me hear from you about the need for experts here.

MR. ROSS: Thank you, your Honor. David Ross. The answer is we don't know at this time. And I'm not sure, but I think that what your Honor has proposed is prudent in that we can, with the extensions that you've talked about and the concept that you laid out about the timing, I think that is reasonable and makes sense to provide for it.

THE COURT: Very good. Thank you.

So let's do this. So I'm going to enter the parties' proposed case management plan and scheduling order with the

following modifications: First, the fact discovery deadline will be approximately 60 days later than the parties proposed; so sometime in mid-February 2023.

The deadlines in paragraphs 7E and F will be changed. The deadline to complete depositions will be approximately three weeks prior to the close of fact discovery.

The deadline for request to admit will be approximately 30 days prior to the close of fact discovery. I note that with respect to that, I'm changing the lag between the date of service and the close of fact discovery so that it is 30 days between the service of the requests to admit and the close of fact discovery. That's because I view requests to admit as a fact discovery tool.

The Court will add deadlines to paragraph 8.

The deadline for the completion of expert discovery will be the same as the deadline for completion of fact discovery.

Party proponent disclosures will be due no later than the date that is six weeks prior to the close of discovery.

Party opponent disclosures will be due no later than four weeks prior to that date.

And I'll push back the date for motions for summary judgment in paragraph 10 to approximately 60 days after the date that the parties initially proposed.

Let me just say a few brief words about the case

management plan and scheduling order, and then I'll come back and comment briefly about the proposed motion for summary judgment.

First. These are real deadlines; so keep in mind that these are real deadlines. We just worked to extend the deadlines so that I can tell you that they are real deadlines. They are real deadlines. They are deadlines for completion of discovery; so please keep that in mind.

The case management plan and scheduling order specifically says that these are deadlines for completion of discovery. It uses the word "completed" when it refers to the deadline for completion of fact and expert discovery. That's an intentional choice of words. It reflects my expectation that discovery will, indeed, be completed by those dates. In other words, that there won't be more after those dates.

You can extrapolate all the corollaries from that rule yourselves, but I just want to highlight a couple of them.

First off, to the extent that there are any disputes about the adequacy or timeliness of any discovery responses, please bring them to my attention promptly so that I can help you resolve them.

(Technical interruption in proceedings.)

Do not sit on or hoard discovery disputes with the expectation that I'll add time to the discovery period to allow you to litigate outstanding discovery disputes. To the

contrary. My expectation is that discovery will be completed by that date. It is not the date on which we will begin litigation about the substance of discovery disputes.

So if you sit on or hoard discovery disputes until late in, much less after, the close of discovery, you should not expect that I will take action to compel the production of those materials. You may instead find that I will conclude that you have waived the opportunity to seek such discovery under the auspices of the Court's scheduling order.

Second. The parties should keep in mind that these are real deadlines. That's a fact that you should contemplate as you're scheduling your discovery protocols. If you were to wait, for example, to take a deposition late in the discovery period, you'd have less time to conduct follow-up discovery.

So just to put it very simply, keep in mind the fact that these are real deadlines. If you wait to make a request for information or to take a deposition, you'll have less time to do anything with the information that you may learn.

Next. The deadlines in paragraph 8C are worthy of particular note. That paragraph requires that you provide all of the disclosures required by rule 26(a)(2) by the deadlines that are specified there. If you fail to provide all of the disclosures required under rule 26(a) by those dates, you can expect that your expert will not be permitted to provide testimony or other evidence in the case.

I reminded you earlier that there is a distinction between report-giving experts and experts who are not required to provide reports. Please think carefully about two things in advance of the deadlines that are specified in paragraph 8C: A, whether you, indeed, need or want to present expert testimony in the case; and, B, consider what the nature is of the disclosures required for the relevant expert, keeping in mind again that even experts who are not specially retained must provide disclosure under rule 26(a)(2).

I'll grant extensions of these deadlines but only for good cause shown. At the heart of a showing of good cause is a showing of diligence; so keep that fact in mind as you make professional judgments about the amount of resources that you want to invest in the case. And if you choose to invest less time or energy in the case than you would prefer, you should not find that I will deal with your grounded decision that you have shown good cause for an extension of the deadlines in that failure. You must show diligence. As a result, the mere agreement by the parties that the extension would be helpful but may not be sufficient to support a finding of good cause. You should factor, in fact, expect that it will not.

By the same token, remember that my expectation is, my hope is, that the parties will work to settle the case amicably. That work should be happening in parallel with your efforts to litigate the case. To put it simply, the fact that

the parties may working to amicably resolve the case or bringing some other substantive motion, those things don't stay discovery. So you must continue to do the work we did in order to meet the discovery deadlines in parallel with those other efforts.

Any requests for an extension of time must be made timely, in accordance with my individual rules of practice and the language in the case management plan and scheduling order.

So I'll enter this case management plan and scheduling order with the changes that we just discussed. It will govern your conduct going forward. I think that is all that I wanted to say about the case management plan.

Counsel, is there anything -- Oh, there is one other thing that I wanted to mention was rule 56(d). I am happy to see a motion or a letter requesting leave to file a motion for summary judgment. A pre-motion conference request letter should be filed in accordance with my individual rules. With respect to any such motion, I'll make a determination after I've received that letter as to whether or not a pre-motion conference is required.

The one thing I just wanted to flag for counsel for plaintiffs, given defendant's remarks, is just the existence of rule 56(d), and I'd ask you to look at that and the case law in the Second Circuit with respect to a party's indication of rule 56(d) in response to an early motion for summary judgment. I

just ask that you consider that, in light of counsel's comments about their anticipated arguments against a motion for summary judgment.

That's all I'll leave you with now. It may be that we'll want to talk about whether or not any potential opposition to a summary judgment motion should be bifurcated in the event that the defendants wish to raise 56(d) as a grounds to oppose the motion. That is, it may make sense to hear any 56(d) arguments and to see the affidavits submitted in support of that before requiring the defendants to respond substantively to the motion, given that those are very different types of issues. It might be efficient.

In any event, I just wanted to raise that. We may or may not discuss it further when we get to the timing of the pre-motion conference with respect to an anticipated motion for summary judgment on that issue.

Anything that I can do at this point to help the parties resolve this case? First, counsel for plaintiff?

MS. WILL: No, your Honor, but thank you. And we'll come back to the Court if we think that there's going to be anything that the Court can help us push forward with settlement discussions.

THE COURT: Very good. Thank you very much.

Please do let me know if there's anything I can do. I'd be happy to refer the parties to either our mediation

program, which is excellent, or the assigned magistrate judge, who is also excellent. So please don't hesitate to come to me.

Just remember that it takes a little bit of time to schedule a mediation. It can take a little more time to schedule a mediation session before the magistrate judge. So don't wait until the last possible minute to ask.

I encourage you to talk about the possibility of resolving the case often. As you all know, the litigation that you're about to embark on is expensive and time consuming. The amounts at issue here, I understand, are potentially large. All the more reason for the parties to work early to try to come to some kind of mutual resolution of these issues to save -- I'm sorry to say this, counsel -- all of the costs of the litigation, which may be able to fuel settlement. So I hope that you'll keep that in mind as you are vigorously representing your clients' interests otherwise.

That's all that I have. Anything else before we adjourn? First, counsel for plaintiffs?

MS. WILL: Nothing for us. Thank you, your Honor.

THE COURT: Thank you.

Counsel for defendants?

MR. ROSS: No, your Honor. Thank you very much.

THE COURT: Very good. Thank you all very much. This proceeding is adjourned.

(Adjourned)